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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No. 10 3 41

**ATLANTIC COAST LINE RAILROAD COMPANY,
PETITIONER,**

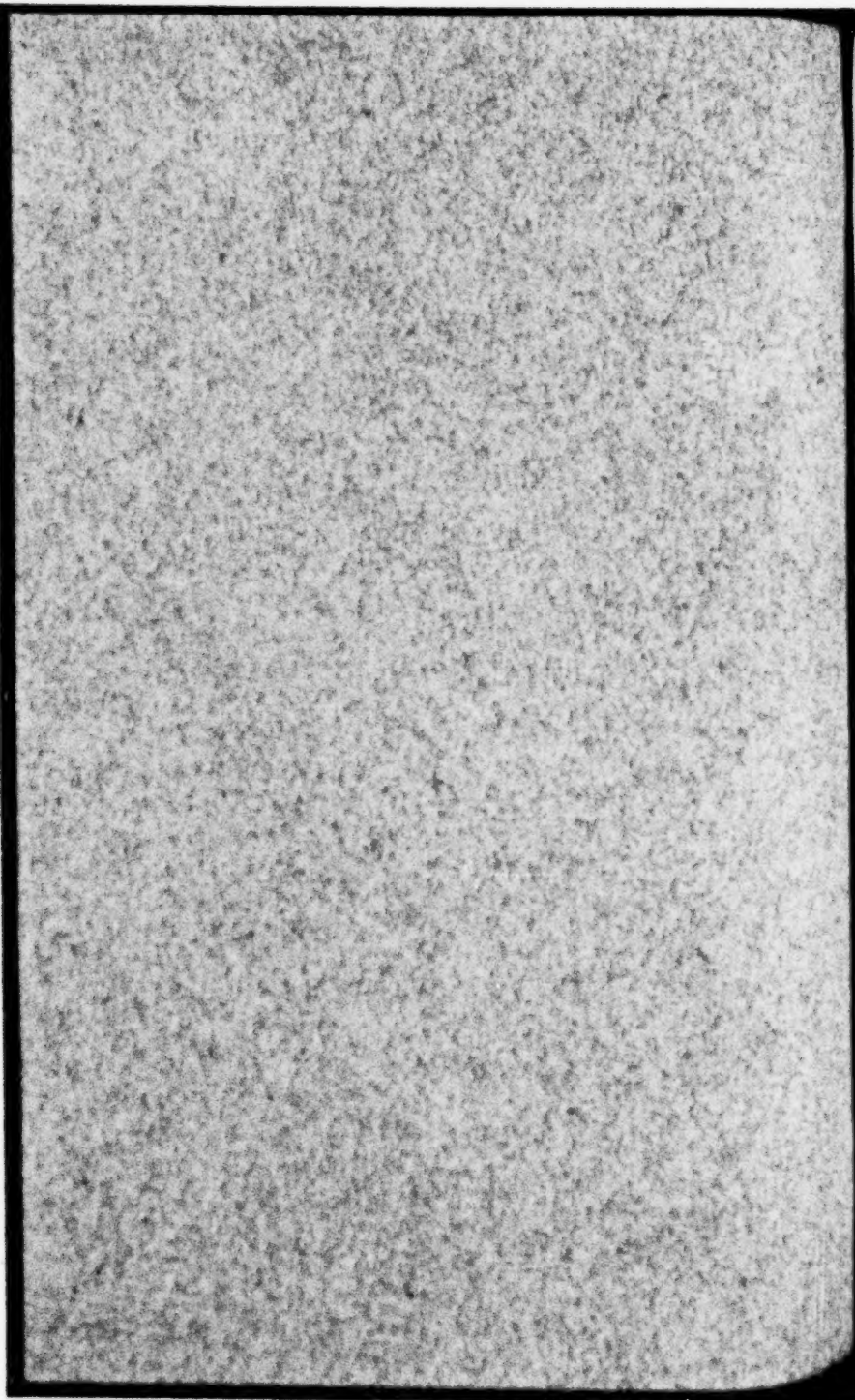
vs.

**IDA MAY SOUTHWELL, ADMINISTRATRIX OF H. J.
SOUTHWELL.**

**PETITION FOR WRIT OF CERTIORARI AND
BRIEF IN SUPPORT THEREOF.**

THOS. W. DAVIS,
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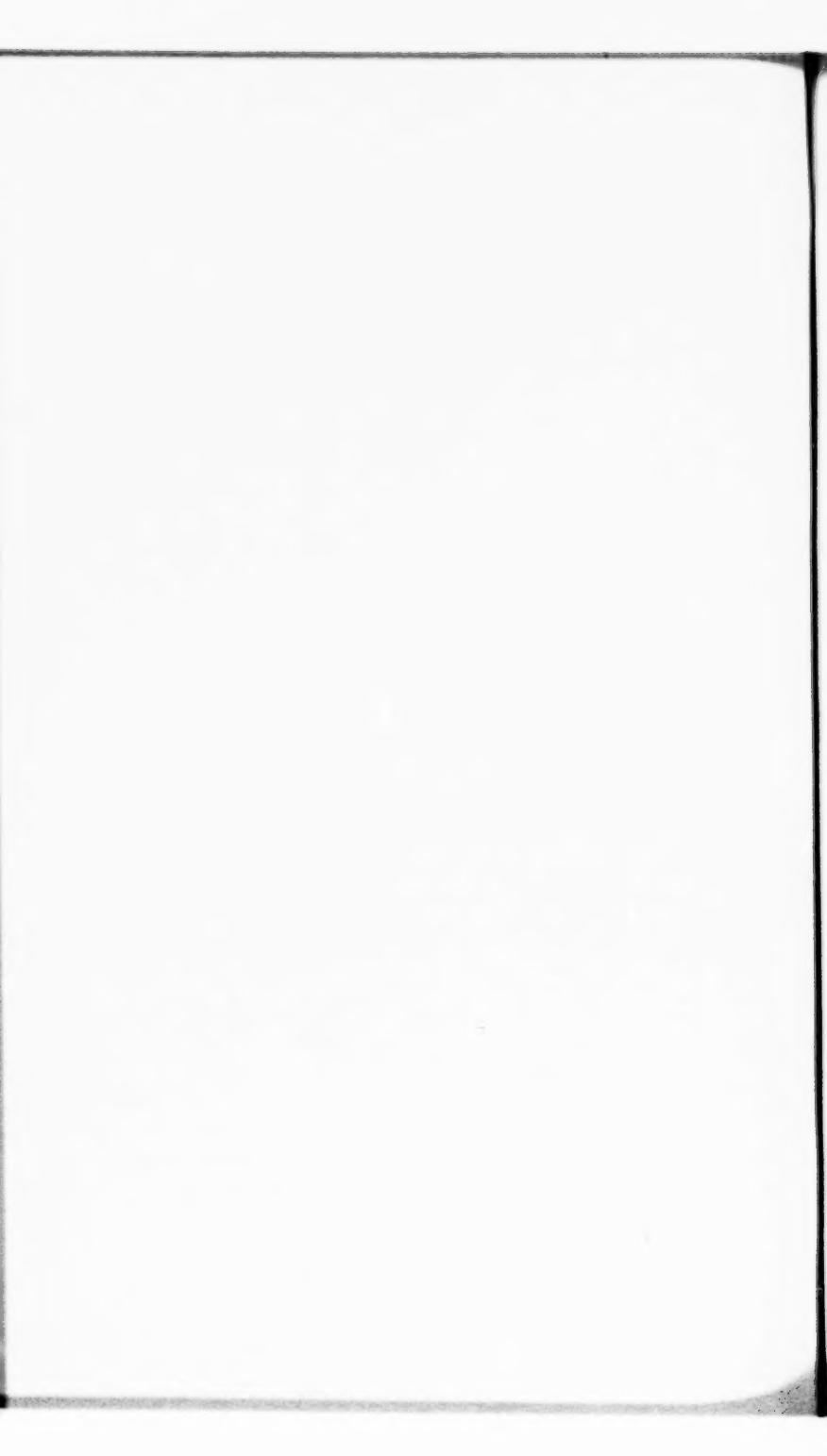


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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No.

ATLANTIC COAST LINE RAILROAD COMPANY,
PETITIONER,

vs.

IDA MAY SOUTHWELL, ADMINISTRATRIX OF H. J.
SOUTHWELL, DECEASED.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

Your petitioner, Atlantic Coast Line Railroad Company, deeming itself aggrieved by a certain judgment of the Supreme Court of North Carolina rendered against it in the case of *Ida May Southwell, administratrix of H. J. Southwell, deceased, vs. Atlantic Coast Line Railroad Company*, defendant and appellant below, which judgment was rendered and became final on the 17th day of February, 1926, prays this

Honorable Court to issue its writ of certiorari, as authorized so to do by the provisions of section 237 of the Judicial Code, as amended by act of Congress September 6, 1916, chapter 448, section 2, and acts February 13, 1925, chapter 229, section 1, addressed to the Supreme Court of North Carolina, commanding it to serve and transmit to this Court, on a day therein named, a full and complete transcript of the record and all proceedings had in the courts of North Carolina in said cause, in so far as the same appear of record or on file in said Supreme Court of the State of North Carolina, to the end that said cause may be reviewed and determined by this Court, as provided by law, and that petitioner have such relief and remedy in the premises as this Court may deem appropriate and justice and right may require.

I.

The matters involved and the reasons relied on by petitioner for the issuance of the writ of certiorari are:

This action, which was tried and decided under the Federal Employers' Liability Act, was brought to recover for the alleged wrongful and negligent death of plaintiff's intestate, H. J. Southwell, an engineer of your petitioner, who, *admittedly, was willfully and intentionally shot and killed by one H. F. Dallas, petitioner's assistant wardmaster, during the strike of July, 1922.* The theory on which the State courts sustained a recovery against petitioner herein was that the evidence supported findings *that petitioner,*

through its officers, knew, or by the exercise of reasonable care should have known, that Dallas intended to make an assault on intestate Southwell on this occasion and could have prevented such assault by exercising due care, and that its failure to prevent such assault was the proximate cause of intestate's death.

Dallas was assistant yardmaster, and also had additional duties assigned him during the strike, and intestate Southwell's attitude toward Dallas and other employees who remained at work during the strike, or took strikers' places, was very antagonistic, and Southwell had several times during the strike *threatened Dallas with serious bodily harm, and probably attempted to run a car over him, and had cursed and abused Dallas, all without cause and without attempted retaliation* (R., 12, 13, 28, and 29). On the other hand, Dallas made no threats and used no harsh language toward Southwell, and *had not at any time prior to the killing shown any animosity toward Southwell* (R., 20). Respondent and the State courts charged petitioner with knowledge of Dallas' alleged purpose to assault or kill Southwell, largely through the alleged knowledge, acts, or omissions of its general yardmaster, Fonvielle. Southwell's train was due in Wilmington (where the killing occurred in the concourse near the depot and yards) about 5:30 p. m. on the evening of the killing (R., 12), and, according to plaintiff's witnesses, he came in around 5 p. m. (R., 30), but the homicide did not occur until about 7 p. m. (R., 10). General Yardmaster Fonvielle and Dallas were together about five minutes before the killing.

near "a butting block" in the passenger-station grounds, and walked together from there out along the concourse to the gates across the concourse, which is just beyond where the killing occurred (R., 10, 11). The engineers' wash-room, where it afterward developed Southwell then was, was in a different direction from the course Fonvielle and Dallas took, and they in their walk did not go near the wash room (R., 26). Plaintiff's own witness, Fonvielle, testified—and his testimony was wholly uncontradicted—that at the time he was with Dallas he had no knowledge or idea whatever that Southwell's train was in or that Southwell was anywhere around there, or that Dallas intended to wait and see Southwell, to assault him or for any other purpose (R., 18 and 19). While Dallas and Fonvielle were walking along the concourse Fonvielle saw a revolver almost falling from Dallas' pocket (R., 12), and this fact was urged by plaintiff, and apparently relied on by the State court, to show petitioner's knowledge that Dallas intended to assault or kill Southwell; but it also appears that a few days before the shooting Dallas and other employees were sworn in by the authorities of the city of Wilmington as special policemen, at the request of the railroad company (R., 22, 32), and hence had a legal right to carry a revolver.

While Fonvielle and Dallas were walking along the concourse toward the gates, Dallas said he wanted to see Southwell, and added, "Cap., all I want to do is to ask Southwell to lay off of me and let me alone" (R., 11). He did not say that he wanted "to wait"

and see Southwell then (R., 14). Fonvielle answered him and in his testimony for plaintiff said:

"I remarked to Mr. Dallas at the time that he must not see Mr. Southwell, that if he saw Mr. Southwell and talked to him, it might bring about unpleasant circumstances" (R., 14).

The facts immediately surrounding the killing are thus given by plaintiff's witness Fonvielle (R., 11) (italics ours):

"We went on together after that possibly thirty or forty feet, which put us within four to six feet of the iron gate across the bridge. I then passed on through the gates in the direction of the lower yard office, and Dallas started back north on the Front Street extension. After passing through the gates I moved approximately eight to twelve feet in the direction of the steps that go down to the lower yard, or near to the head of the steps, which was possibly thirty feet from where Dallas and I separated. After reaching this point, I happened to casually glance to the right and saw Southwell and Dallas approaching each other, approximately forty feet from the gates. I turned and came back through the gates heading toward Dallas and Southwell. After passing through the gates, instead of going directly toward Dallas and Southwell, I went at an angle of possibly fifteen degrees in the direction of the station master's door, which was to the left and between myself and Dallas and Southwell; that was possibly five seconds before the shooting occurred. I had probably taken three steps inside of the gate before Southwell grabbed Dal-

las and I had then moved possibly four or five steps in the direction of Dallas and Southwell before the gun fired."

Fonvielle's testimony here and elsewhere that he did not know of Southwell's whereabouts or presence until he casually looked around and saw them approaching each other is confirmed by intestate's dying declaration as given by his wife (R., 38), who testified that Southwell said he was coming from his engine on his way home "and just as he got in the concourse he saw two men coming from behind a truck, and one went in the *opposite direction* from the other, and he said Mr. Dallas came up to him with the gun raised to his hand."

All the evidence is that Dallas was not on duty at the time of the killing, having gone off duty at four o'clock (R., 22 and 23, 26, 15 and 20), although evidence was admitted, over petitioner's objection, that Dallas, about 6:30 p. m., of his own volition, was phoning to a trainman, without having been requested by any superior officer to do so.

Dallas was tried twice for first degree murder, and on the second trial was found guilty of manslaughter (R., 36 and 38).

Every paragraph in the complaint attempting to state a cause of action (R., 2 and 3) alleged that Southwell was wilfully assaulted and murdered by Dallas. The fourth paragraph alleges that "defendant negligently, wantonly, and wilfully caused the death and murder of plaintiff's intestate by and through its agent

and assistant yardmaster, H. E. Dallas, who, *to the knowledge of his superior officer, the defendant's chief yardmaster, E. L. Fouvielle, was waiting near the exit from defendant's premises for the express purpose of assaulting plaintiff's intestate.*" The fifth paragraph repeats these allegations in connection with the allegation of failure to furnish a safe place of work; the sixth paragraph alleges that defendant, through its employee, Dallas, "who, *as an armed police officer* of the defendant, was charged by it with the duty of protecting and safeguarding its employees" from violence, and who, "while acting within the scope of his employment," viciously and wickedly assaulted and killed the plaintiff's intestate; the seventh paragraph alleged that defendant knew of Dallas' "ill will, malice and rage" toward Southwell, and that Dallas was not a suitable person in whom to impose authority, or in whose hands to place dangerous instrumentalities, and that in maintaining him in such position armed with a deadly weapon, "knowing his ill will and rage toward plaintiff's intestate, defendant was guilty of gross, wilful, and wanton negligence."

Petitioner contends that none of these allegations were sustained by any evidence.

Petitioner assigned error to the refusal to nonsuit the plaintiff at the close of her evidence, and also at the close of all of the evidence (R., 62), and likewise assigned error to instructions submitting the question of negligence based on a finding that petitioner knew or should have known of Dallas' intention to assault or kill Southwell (R., 63), and to instructions submit-

ting the question of whether intestate's death was due to defendant's negligence, and whether such negligence was the proximate cause of his death (R., 64), and also to the refusal of the requested instruction (R., 65) that if intestate was shot and killed by Dallas, and he was not acting within the scope of his employment or in furtherance of the railroad company's business, but the killing occurred on account of personal feelings between Dallas and Southwell, that the defendant would not be liable (R., 65).

The case was tried and appealed twice. On the first trial a nonsuit was granted, but the judgment was reversed by the State Supreme Court, and on the second trial judgment was rendered for plaintiff for twelve thousand dollars (\$12,000), and was affirmed by the judgment of the State Supreme Court, which is now under review (R., 57, 84).

II.

Petitioner earnestly contends that the writ of certiorari should be granted to review and reverse the judgment of the State court because:

(1) The undisputed evidence shows that the proximate cause of Southwell's death was the wilful and criminal act of Dallas, which was wholly outside the scope of his authority, and not in furtherance of the master's business, and committed without its direction, knowledge, or approval, so that petitioner is not liable therefor under the direct holding of this court in *Davis, Director General, vs. Green*, 260 U. S., 349,

which reversed a similar decision of the Supreme Court of Mississippi, attempted to be based on alleged negligence of the railroad company in failing to protect a servant from a wanton, homicidal act.

(2) There is no evidence in the record to authorize a finding that petitioner should have known that Dallas intended to assault and kill intestate and was negligent in failing to protect him from Dallas, or otherwise.

The theory adopted by the State Supreme Court, that petitioner was guilty of negligence in failing to protect Southwell, with knowledge that Dallas intended to assault him (and even that is not supported by any evidence), is the same as that attempted to be applied by the Mississippi Supreme Court in the *Green* case, *supra*, which this Court reversed on the ground that the proximate cause of the death was the wilful and homicidal act of another employee, which was not done in the course of his employment or in furtherance of the master's business, even though there was ample evidence in the *Mississippi* case, as found by the State Supreme Court and not questioned by this Court, that the master had knowledge of the dangerous character of the employee, who habitually carried a pistol and had tried to kill intestate several times.

Wherefore, because said decision and judgment decided the foregoing Federal questions in a way not in accord with the applicable decisions of this Court, your petitioner prays that a writ of certiorari be issued to the Supreme Court of North Carolina, to the end that said cause may be reviewed and determined by this

Court, as provided by law, and that upon such review the said judgment of the Supreme Court of North Carolina be ordered to be reversed and this cause dismissed.

ATLANTIC COAST LINE RAIL-
ROAD COMPANY,

By THOS. W. DAVIS,

*Attorney for Petitioner, Atlantic
Coast Line Railroad Company.*

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